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DEPT FOR DRL, INL, AND EUR/SCE, NSC FOR BRAUN, USUN FOR
DREW SCHUFLETOWSKI, USOSCE FOR STEVE STEGER

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SUBJECT: KOSOVO: CONSTITUTIONAL DRAFTING CONFERENCE FOCUSES
ATTENTION ON AHTISAARI REQUIREMENTS AND TOUGH POLITICAL
DECISIONS

Classified By: COM TINA KAIDANOW FOR REASONS 1.4 (B) AND (D).

11. (C) SUMMARY: Presentations by U.S. experts at a June 13-16 meeting in Skopje of the expanded pre-constitution working group organized by the OSCE Mission in Kosovo and supported by USAID/Kosovo (and attended by, among others, representatives of Kosovo's Serb community) have sparked discussions in Pristina on difficult political questions. These include what kind of government Kosovo's initial post-settlement constitution will set up and the distribution of powers therein. Kosovo's Unity Team, made up of the leading governing and opposition figures, still has not provided the necessary political guidance to members of the working group to design Kosovo's first post-status government, but USOP, working together with the ICO planning team, will try to offer assistance and mediation. However, we may need a higher-level U.S. diplomat to work the constitutional issue on a full-time basis, particularly once the current head of the ICO PT leaves at the end of July.
END SUMMARY.

12. (SBU) U.S. experts at an off-site session of the expanded pre-constitution working group held June 13-16 in Skopje, Macedonia, focused participants' attention first on the substantive requirements of the Ahtisaari settlement document relating to human rights and fundamental freedoms, community rights, national government structures, municipalities and the economy. They also suggested other provisions not required by the Ahtisaari proposal, but which are common in constitutions within the region. Discussions on the last two days of the conference raised the difficult political questions of what form of government (semi-parliamentary or semi-presidential) Kosovo's initial post-settlement constitution will set out and the distribution of powers therein. In addition to 13 of the 18 Albanian and non-Serb minority members of the expanded working group, seven representatives of Kosovo Serb political parties who participate in Kosovo government institutions or members of newly registered autocephalous Kosovo Serb political parties attended the conference and contributed their views on topics that affect their community.

13. (SBU) During the conference, the U.S. experts were careful always to refer to the group as the "expanded pre-constitution working group" despite the insistence by most of the participants to refer to it prematurely as the "Constitution Commission" envisioned by March 7 final draft of the Ahtisaari proposal. U.S. experts included Eastern District court judge John Tunheim and comparative constitution law professors Louis Aucoin and Christie Warren from, respectively, the Fletcher School of Law and Diplomacy and William and Mary Law School. (USOP has forwarded the English language version of the conference materials to EUR/SCE.)

Questions of mandates and preambles dominate early discussions

14. (SBU) The first day and a half of the conference focused on the mandate of the Constitution Commission and sought to secure agreement among participants on proposed rules of procedure and the appropriate level of public outreach before, during and after drafting the constitution. The expanded working group members approved the proposed rules (as revised at the Skopje meeting) on June 22. Hydjat Hyseni from the opposition Democratic Party of Kosovo (PDK), a member of the staff of the Kosovo Assembly legislative drafting committee, tried to object to the mandate of the Commission to draft the constitution, but he was quickly silenced by PDK deputy president Jakup Krasniqi, who replied that the Commission's mandate is already established by the Ahtisaari proposal and cannot be changed. The group did decide that the Kosovo Assembly should be allowed 21 days to complete its review of any draft constitution ultimately created by the Constitution Commission. All participants agreed that some limited public outreach prior to the UN Security Council resolution might be possible. There were

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spirited -- and unresolved -- debates on whether to refer to outreach as an "education" or an "information" campaign and whether the Constitution Commission should reach out to the Kosovo Assembly before it begins its outreach to the general public.

15. (C) U.S. constitution experts deftly handled the issue of preambles -- a cause of some concern since two draft constitutions submitted thus far to the working group had been rejected by international representatives for containing references to the "overall resistance against occupation and the fighting of the Kosovo Liberation Army" and the "genocide and ethnic cleansing in Kosovo by Serbia." U.S. experts provided examples of similarly inflammatory preambles from the constitutions of North Korea, China and Cuba and contrasted them with the simple, aspirational and inclusive language from introductory statements in the constitutions of Latvia, Hungary, Bulgaria, Slovenia and Bosnia. (NOTE: We believe the message was understood, although working group chairperson Hajredin Kuci from the PDK stated that if the Kosovo constitution has a preamble, the language would be "something in between" the examples provided by the U.S. experts. END NOTE).

16. (SBU) The experts gave excellent presentations of all constitutional requirements contained in the Ahtisaari settlement document, including those specifically required and those not specifically required but which should be considered. This review sparked several of the participants to vent their dissatisfaction with particular provisions of the Ahtisaari settlement proposal. Nekibe Kelmendi, the deputy chair of the expanded working group from the governing Democratic League of Kosovo (LDK), argued that the constitution should only include those items specifically mandated by Ahtisaari. Randjel Nojkic of the Serbian List for Kosovo and Metohija (SLKM) took issue with the reduced number of seats given to minorities under the Ahtisaari plan than those mandated under Kosovo's current Constitutional Framework. He also disagreed with the document's call for a single currency, which he argued would be a burden for Kosovo

Serbs, who receive salary and social benefit payments from Serbia in Serbian dinars.

Conference sparks debate on separation of powers

¶17. (C) Participants agreed that Kosovo's new constitution should contain checks and balances within the different branches, but differed along party lines on the division of power between the president and the prime minister. The PDK's Arsim Bajrami, a combative force behind several earlier failed attempts to draft a constitution before the Constitution Commission could be set up, used one of his lengthy interventions to claim the Unity Team had already agreed to a parliamentary system with a strong prime minister. Under his plan, the Assembly would elect Kosovo's president and could bring an article of impeachment if the president violates the constitution, which then could be decided by the constitutional court. Bajrami also proposed further weakening the Office of the President by not requiring the president to sign laws in order for them to come into force.

¶18. (C) LDK members took issue strongly with Bajrami's attempted "fait accompli" weakening of the Kosovo president. Rame Manaj, General Secretary of the LDK and principal advisor to Kosovo Assembly president Kule Berisha, argued that a president with greater powers directly elected by the people of Kosovo would have more legitimacy than a weak one selected by the Kosovo Assembly. Nekibe Kelmendi, also of the LDK, added that the Ahtisaari proposal implies a separation of power by dividing responsibilities between the President and Prime Minister. Fearing the tide had turned, the PDK's Jakup Krasniqi said that this important political issue must be decided not by the constitutional working group, but by the Unity Team. He attempted to close the discussion by stating that the Unity Team has already decided

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that the president should be elected by a two-thirds vote of the Kosovo Assembly. He also warned against concentrating power in the hands of one person, especially in the Balkans, because of the risk that person "will become a dictator," and surmised that the best system for Kosovo would have been a parliamentary system. The Venice Commission's Thomas Markaert suggested the group consider the same type of president as in Albania and added that a modified parliamentary system -- rather than a semi-presidential system with a directly-elected president -- might be best for Kosovo. Working group chairman Hajredin Kuci closed the session by suggesting the establishment of a sub-group to take up this issue.

¶19. (SBU) Discussion on the Kosovo Assembly centered around extending the mandate of members from the current three years to four and prohibiting members from keeping their seats in the Assembly if they accept jobs in the government. Working group members from the opposition PDK and ORA Reform Party took issue with several ministers and deputy ministers from the ruling coalition who decided to keep their seats in the Kosovo Assembly after they joined the government. Interestingly, the LDK's Nekibe Kelmendi joined in support of their prohibition. In other developments, there was general acceptance of the proposed five percent threshold (for majority Albanian parties) for gaining seats in the Assembly. The SLKM's Nojkic used the discussion as an opportunity to chastise the current Assembly leadership for not taking seriously suggestions from its Serb members. He also attacked ORA president Vetton Surroi's leadership of the Communities Consultative Council for "not caring about the Serb community in Kosovo."

Agreement on a strong judiciary, but limited mandate for the Constitutional Court

¶10. (SBU) U.S. experts also led a discussion of the judicial branch, including the proposed Constitutional Court.

Participants suggested eight year tenures for judges with the possibility of re-appointment but not lifetime appointments. They were divided on who should head the Kosovo Judicial Council (KJC), the 13-member independent body responsible for deciding on candidates for judicial office, promotion and transfer of judges, and for disciplinary proceedings against judges. Some suggested the head of the Supreme Court, others the head of the proposed Constitutional Court. SLKM representative Dragisa Krstovic said that a professional, independent judiciary united across ethnic lines is of common interest to all of Kosovo's communities. Iljaz Ramajli from the LDK warned against giving the KJC too much power and Kelmendi repeated her argument that the Ministry of Justice should be responsible for setting up local courts in the proposed new majority Serb municipalities, and not the KJC, as provided in the Ahtisaari proposal.

¶11. (SBU) Despite the fact that the U.S. does not have a separate Constitutional Court, the experts also provided some thoughts to participants on this court, the establishment of which is mandated by the Ahtisaari settlement document. Judge Tunheim pointed out that the qualifications of the judges who will serve on the court need to be spelled out along with the scope of its jurisdiction. He noted that the work of this Court will be controversial, particularly in the early years when it will be asked to establish the constitutional boundaries among governing authorities and possibly rule against the majority in enforcing the rights of minorities. He noted that it will be important for the Court to have prestige and public support for these difficult tasks. He suggested that the Court be given explicit authority to annul laws and other acts of the government inconsistent with the constitution, which should explicitly state that the result of the Court's decision is that the annulled law is unenforceable.

¶12. (SBU) Tunheim recommended limiting the Court's jurisdiction to guard against overburdening it. Arsim

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Bajrami agreed and suggested that the Court have only three mandates: authority to interpret the constitution; authority to review laws and annul those that it decides violate the constitution; and authority to control and possibly punish high ranking government officials. He warned against burdening the Court with election law issues or cases that should be decided in other courts. Bajram Latifi, a Bosniak representative from the "Six Plus" Assembly caucus, agreed that the Court must be able to review laws for compliance with the constitution and should be able to take up cases against public officials. Latifi also complained about the provision in the Ahtisaari proposal that requires a minimum of ten members of the Kosovo Assembly to contest the constitutionality of any law or decision by the Assembly. He said this would preclude ethnic Bosniak MPs from challenging Assembly actions without enlisting the assistance of other ethnic groups. Dragisa Krstovic also asked for greater clarity than the Ahtisaari language provides about who on behalf of a municipality can contest the constitutionality of acts of the government.

Serbs engage most actively in community rights discussion

¶13. (SBU) Serb participants were most active during the session on human rights and protection of minorities. Nojkic used the discussion of the Community Consultative Council mandated by the Ahtisaari plan to attack ORA leader Vetton Surroi, who heads this Council. He also criticized members of the other minority communities who Nojkic believes conspired with Surroi to weaken protections for Kosovo's Serb community during the deliberations by the existing Communities Consultative Council of the draft Ahtisaari proposal. Minister for Communities and Returns Branislav Grbic used his brief intervention to remind participants that protection of human rights is not a theoretical matter, but rather one that is vital to the ability of different

communities to live together in Kosovo. Working group chairman Kuci responded to Hydajet Hyseni's suggestion to have a separate law on the rights of communities (a notion shared by other members of the working group) by stating that every right guaranteed to communities by the Ahtisaari plan should be enshrined in the constitution.

¶14. (SBU) The U.S. experts pointed out that the Ahtisaari plan sets forth a much more detailed plan for decentralization than is contained in any other constitution of the region and that such detail will provide more avenues for challenging municipal acts in the proposed Constitutional Court. Nojkic noted that the long-term aim of decentralization should be that there are no differences between how people in each municipality live. He said that the idea of decentralization has been around for a long time in Kosovo, citing efforts by previous SRSGs Bernard Kouchner and Michael Steiner to give more power to localities. Nojkic argued that UNOSK had gone too far in gerrymandering the boundaries of the proposed new majority Serb municipality of Gracanica by excluding parts of cadastral zones inhabited by Albanians or where Albanian businesses are located, thus denying Gracanica a valuable future tax base. Hydajet Hyseni echoed Nojkic's comments, referring to the UNOSK plan as the "Bosniaization" of Kosovo and adding that the proposed decentralization plan will be a catastrophe for his native municipality of Gjilane. Kuci concluded by stating that the new constitution should contain all of the language required by the Ahtisaari plan along with a reference to the European Charter on Self-Government, except those parts of the European Charter relating to sub-municipal units which, according to Kuci, are not envisioned for Kosovo.

¶15. (C) The discussion of the security sector provisions of the Ahtisaari plan brought sharp contrasting opinions into view, since the plan provides that the proposed Kosovo Security Council report to the prime minister, thus greatly diluting the power of the president. (NOTE: A member of UNOSK's legal staff told us privately that NATO drafted most of this section of the Ahtisaari plan, which plays directly

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into the hands of the PDK and its preference for a strong prime minister and a weak, figurehead president. END NOTE). Representatives from both the LDK and its coalition partner the Alliance for the Future of Kosovo (AAK) stated that the president should be the Commander-in-Chief, to which Thomas Maerkert responded that control over the proposed Kosovo Security Force should be with the government in the form of a prime minister or a civilian minister of defense, although he allowed that the president could be the symbolic head of any future Kosovo armed forces.

¶16. (C) COMMENT: The meeting focused attention on the requirements contained in the Ahtisaari plan and acted as a catalyst for the Unity Team to tackle the difficult political questions associated with the division of power in post-status Kosovo. It also helped put the new members of the expanded working group on the same level as their colleagues who began their work at the group's inception in January, and to get a number of Kosovo's Serbs -- including some new faces on the local scene -- to participate. President Sejdiu's senior political advisor told us June 21 that shortly after the conference, the ruling LDK reached agreement with the opposition PDK to divide up powers between the future president and prime minister. However, a senior PDK representative has also asked for our assistance in convincing the LDK to back down from their insistence that the president be elected by direct popular vote, rather than through the Kosovo Assembly, leading us to believe there is plenty of devil left in the details.

¶17. (C) Comment, cont. Kosovo's Unity Team needs to provide some much needed political guidance to members of the working group to design Kosovo's first post-status government. We will focus our attention over the next several weeks on

getting the Unity Team to provide this guidance and will work with our partners in the ICO preparatory team to try and mediate between the LDK and PDK, the key protagonists, in finding a mutually acceptable arrangement. However, we may need a full-time U.S. diplomat to take on the sensitive mediation role, especially once the current head of the ICO office, who has been leading the constitutional effort, departs at the end of July. We would request that the Department take a renewed look at finding someone suitable, for work in the later part of August and September (and possibly longer).

KAIDANOW